FEB 22 2001 (4)

No. 00-763

Supreme Court, U.S.
FILED
FEB 22 2001
CLERK

In The
Supreme Court of the United States

SHARON B. POLLARD,
Petitioner,

v.

E.I. DUPONT DE NEMOURS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

KATHLEEN L. CALDWELL *
ALAYNE B. ADAMS
TAYLOR, HALLIBURTON, LEDBETTER & CALDWELL
44 NORTH SECOND STREET
SUITE 200
MEMPHIS, TN 38103
(901) 523-8153

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON SCHOOL OF LAW
1100 NE CAMPUS PARKWAY
SEATTLE, WA 98105
(206) 616-3167

* Counsel of Record

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OH 800-890-5001

73 pp

QUESTION PRESENTED

Whether front pay is an element of compensatory damages under the Civil Rights Act of 1991.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	4
Statement of the Facts	5
Summary of Argument	12
Argument	14
Introduction	14
I. The Language of Section 1981a Precludes Treating Front Pay As A Part of Compensatory Damages	17
II. The Legislative History of Section 1981a Demonstrates That Congress Did Not Intend to Treat Front Pay As Part of Compensatory Damages	26
III. Treating Front Pay As Part of Compensatory Damages Under Section 1981a Would Raise Serious Problems for Judicial Enforcement of Title VII	38
Conclusion	49

Appendix A: Title VII Front Pay Cases Decided by the Courts of Appeals Prior to The Enactment of the Civil Rights Act of 1991 . . . . 1a

Appendix B: Decisions Favoring Front Pay To Avoid "Bumping" An Innocent Incumbent Employee 7a

Appendix C: Decisions Holding District Court Denial of Front Pay Not An Abuse of Discretion 9a

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 22, 41

Anderson v. Group Hospitalization, Inc.,
820 F. 2d 465 (D.C.Cir. 1987) 38, 41

Association Against Discrimination v. City of Bridgeport,
647 F. 2d 256 (2d Cir. 1981) 21

Beacon Theaters v. Westover,
359 U.S. 500 (1959) 47, 49

Becker v. ARCO Chemical Co.,
207 F. 3d 176 (3d Cir. 2000) 21

Briseno v. Central Technical Community College Area,
739 F. 2d 344 (8th Cir. 1984) 39, 41

Bruso v. United Airlines, Inc.,
2001 WL 87635 (7th Cir.) 40, 43

Burlington Industries v. Ellerth,
524 U.S. 742 (1998) 45

Bush v. Lone Star Steel Co.,
373 F. Supp. 526 (E.D.Tex. 1974) 15

Carter v. Sedgwick County, Kan.,
929 F. 2d 1501 (10th Cir. 1991) 39, 42

Caudle v. Bristow Optical Co., Inc.,
224 F. 3d 1014 (9th Cir. 2000) 40

Cross v. Board of Ed. of Dollarway, Ark. Sch. Dist.,
395 F. Supp. 531 (E.D.Ark. 1975) 39

Day v. Wayne County Bd. of Auditors,
749 F. 2d 1199 (6th Cir. 1984) 23, 41

Dillon v. Coles,
746 F. 2d 998 (3d Cir. 1984) 22

Dominic v. Consolidated Edison Co. of New York, Inc.,
822 F. 2d 1249 (2d Cir. 1987) 48

EEOC v. Enterprise Ass'n Steamfitters,
542 F. 2d 579 (2d Cir. 1976) 41

EEOC v. Prudential Fed. Sav. & Loan Ass'n,
741 F. 2d 1225 (10th Cir. 1984) 44

EEOC v. Safeway Stores, Inc.,
634 F. 2d 1273 (10th Cir. 1980) 18

EEOC v. W & O, Inc.,
213 F. 3d 600 (11th Cir. 2000) 46-47

Erebia v. Chrysler Plastic Products Corp.,
863 F. 2d 47 (table), 1988 WL 125356
(6th Cir. 1988) 22, 23

Fadhl v. City and County of San Francisco,
741 F.2d 1163 (9th Cir. 1984) 16, 40

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 45

Farley v. Nationwide Mutual Insurance Co.,
197 F. 3d 1322 (11th Cir. 1999) 40, 47

Fite v. First Tennessee Production Credit Ass'n,
861 F.2d 884 (6th Cir. 1988) 24

Fitzgerald v. Sirloin Stockade, Inc.,
624 F.2d 945 (10th Cir. 1980). 23, 42

Floca v. Homcare Health Services, Inc.,
845 F. 2d 108 (5th Cir. 1988) 22

Ford v. Rigidply Rafters, Inc.,
984 F. Supp. 386 (D.Md. 1991) 18

Franks v. Bowman Transportation Co., Inc.,
424 U.S. 747 (1976) 16, 17, 18

Gallo v. John Powell Chevrolet, Inc.,
779 F. Supp. 804 (M.D.Pa. 1991) 18

Goss v. Exxon Office Systems Co.,
747 F. 2d 885 (3d Cir. 1984) 38, 40, 42

Gotthardt v. National Railroad Passenger Corp.,
191 F. 3d 1148 (9th Cir. 1999) 21, 40

Green v. USX Corp.,
843 F. 2d 1511 (3d Cir. 1988) 22, 40

Gutzwiller v. Fenik,
860 F. 2d 1317 (6th Cir. 1988) 23

Horn v. Duke Homes, Div. of Windsor Mobile Homes,
755 F. 2d 599 (7th Cir. 1985) 41

Hudson v. Reno,
130 F. 3d 1193 (6th Cir. 1997) . . . . . *passim*

Ingram v. Madison Square Garden Center, Inc.,
709 F. 2d 807 (2d Cir. 1983) 22

Jackson v. City of Cookeville,
31 F. 3d 1354 (6th Cir. 1994) 21

James v. Stockham Valves & Fittings Co.,
559 F. 2d 310 (5th Cir. 1977) 41, 42

Johnson v. Chapel Hill Independent School Dist.,
853 F. 2d 375 (5th Cir. 1988) 41, 42

Johnson v. Railway Express Agency,
421 U.S. 454 (1975) 25

King v. Staley,
849 F. 2d 1143 (8th Cir. 1988) 23, 39

Kramer v. Logan County School District,
157 F. 3d 620 (8th Cir. 1998) 14

Lander v. Lujan,
888 F. 2d 153 (D.C.Cir. 1989) 16

Lewis v. Quaker Chemical Corp.,
228 F. 3d 1152 (table), 2000 WL 1234356
(6th Cir. 2000) 20

Lorillard v. Pons,
434 U.S. 575 (1978) 12, 18

McCann v. Litton Systems, Inc.,
767 F. Supp. 127 (S.D.Miss 1991) 18

McCue v. State of Kansas, Dept. of Human Resources,
165 F. 3d 784 (10th Cir. 1999) 17

McKennon v. Nashville Banner Publishing Co.
513 U.S. 352 (1995) 16

Mertens v. Hewitt Associates,
508 U.S. 248 (1993) 24

Mitroff v. Xomoc Corp.,
797 F. 2d 271 (6th Cir. 1986) 23

Nord v. United States Steel Corp.,
758 F. 2d 1462 (11th Cir. 1985) 22, 40

Pals v. Schepel & GMC Truck, Inc.,
220 F. 3d 495 (7th Cir. 2000) 41, 47

Passantino v. Johnson & Johnson Consumer Products,
212 F. 3d 493 (9th Cir. 2000) 21

Patterson v. American Tobacco Co.,
535 F. 2d 257 (4th Cir. 1976) 13, 39, 42

Pitre v. Western Elec. Co., Inc.,
843 F. 2d 1262 (10th Cir. 1988) 22, 39

Polk v. Yellow Freight System, Inc.,
801 F. 2d 190 (6th Cir. 1986) 41

Powers v. Grinnell Corp.,
915 F. 2d 34 (1st Cir. 1990) 16

Proctor v. Consolidated Freightways Corp. of Delaware,
942 F. 2d 793 (table), 1991 WL 170024
(9th Cir. 1991) 42

Ramos v. Davis & Geck, Inc.
167 F. 3d 727 (1st Cir. 1999) 40

Roush v. KFC Nat. Management Co.
10 F. 3d 392 (6th Cir. 1993) 24

Rutherford v. Harris County, Texas,
197 F. 3d 173 (5th Cir. 1999) 47

Schwartz v. Gregori,
45 F. 3d 1017 (6th Cir. 1995) 24

Shore v. Federal Express Corp.,
42 F. 3d 373 (6th Cir. 1994) 23-24, 41

Shore v. Federal Express Corp.,
777 F. 2d 1155 (6th Cir. 1985) 23-24, 40

Simmons v. Marsh,
917 F. 2d 23 (table), 1990 WL 163059
(4th Cir. 1990) 23

Skalka v. Fernald Environmental Restoration Management Corp.,
178 F. 3d 414 (6th Cir. 1999) 21

Smith v. Wade,
461 U.S. 30 (1983) 21

Spears v. Board of Educ. of Pike County, Ky.,
843 F. 2d 882 (6th Cir. 1988) 22, 23

Stafford v. Electronic Data Systems Corp.,
749 F. Supp. 781 (E.D.Mich. 1990) 41

Suggs v. Servicemaster Educ. Food Management,
72 F. 3d 1228 (6th Cir. 1996) 15, 24, 42

Sullivan v. National Railroad Passenger Corp.,
170 F. 3d 1056 (11th Cir. 1999) 21

Thompson v. Sawyer,
678 F. 2d 257 (D.C.Cir. 1982) 40

Thorne v. City of El Segundo,
802 F. 2d 1131 (9th Cir. 1986) 40

Thurman v. Yellow Freight Systems, Inc.,
97 F. 3d 833 (6th Cir. 1996) 23

United States v. Burke,
504 U.S. 229 (1992) 16, 17, 24, 39

United States v. United States Steel Co.,
371 F.Supp. 1045 (N.D.Ala. 1973) 15

White v. Carolina Paperboard Corp.,
1975 WL 250 (W.D.N.C.), *aff'd*
564 F. 2d 1073 (4th Cir. 1977) 15

Statutes

28 U.S.C. § 1254(1) 1

29 U.S.C. § 626(c)(2) 24

42 U.S.C. § 1981a *et seq.* . . . . . *passim*

42 U.S.C. § 2000e-5(g) 1, 2, 14

105 Stat. 1071 45

105 Stat. 1075 36

Title VII of the 1964 Civil Rights Act . . . . . *passim*

Section 706(g) of Title VII . . . . . *passim*

ERISA § 502(a)(3) 24

Age Discrimination in Employment Act 24

Legislative History

118 Cong. Rec. 7166 14

136 Cong. Rec. 17685-66 29

136 Cong. Rec. 22148-19 29

136 Cong. Rec. 28637 36

137 Cong. Rec. 16963 34

137 Cong. Rec. 28680 35

137 Cong. Rec. 29046 35

137 Cong. Rec. 30661 37

137 Cong. Rec. 30678-83 37

H.R.Rep. 102-40 (I), pp. 65, 67, 74 26

H.R.Rep. 102-40 (II), p. 25 26

H.R.Rep. 101-644 (part 1), pp. 38, 76 26

H.R.Rep. 101-644 (part 2), p. 32 26

H.R.Rep. 101-644 (part 2), p. 36 28

S. Rep. 101-315 . . . . . 26, 28

H.R. 1, 102d Cong., 1st Sess 31

H.R. 1375, 102d Cong., 1st Sess 31

S. 2104, 101st Cong., 2d Sess. 18, 19, 27, 30

S. 611, 102d Cong., 1st Sess 31

S. 1207, 102d Cong., 1st Sess 32

S. 1208, 102d Cong., 1st Sess 32

S. 1209, 102d Cong., 1st Sess 32, 33, 35

S. 1407, 102d Cong., 1st Sess 34

S. 1408, 102d Cong., 1st Sess 34

S. 1409, 102d Cong., 1st Sess 33, 34, 35

S. 1745, 102d Cong., 1st Sess 34, 35, 36

Message from The President of the United States Transmitting Alternative Language to S. 2104 As Passed by The Congress (1990) 30

Message from The President of The United States Returning Without My Approval S. 2104, The Civil Rights Act of 1990. 30

Hearings on H.R 1 Before the House Committee on Education and Labor, 102d Cong., 1st Sess. 19, 24

Hearing Before the Senate Committee on Labor and Human Resources on S. 2104, 101st Cong., 2d Sess. 18

Hearings on H.R. 4000 before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 101st Cong., 2d Sess. 19, 20, 24

Other Authorities

2 B. Lindemann & P. Grossman, *Employment Discrimination Law*, 1815-21 (3d ed. 1996) 15

5 L. Larson, *Employment Discrimination* § 92.12 (2d ed.) 15

S. Grebeldinger, "*The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*", 1996 U.Ill. Law. Rev. 319 (1996) 15, 40

"*Making Plaintiffs Whole: The Need for Front Pay Under the ADEA and Other Antidiscrimination Statutes*", 49 Law & Contemp. Probs. 238 (1986) 15

"*Civil Rights--Front Pay Adopted as Available Remedy Under the Age Discrimination in Employment Act*", 20 Suffolk U.L.Rev. 681 (1986) 15

M. Kimler, "*Front Pay As An Appropriate Remedy Under the Age Discrimination in Employment Act*", 32 Wayne L. Rev. 115 (1985) 15

P. Janovsky, "*Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*", 53 Fordham L.Rev. 579 (1984) . . 15

"*Front Pay--Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*", 29 Vand. L.Rev. 211 (1976) 15

National Foundation for the Study of Employment Policy 19

EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, I, II, n. 9, II A (1), *reprinted in* BNA EEOC Compliance Manual, N:6071 *et seq.*. 18, 26

"*Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy: Impact Update*", A Report by the National Women's Law Center 20

Report of the United States Commission on Civil Rights on the Civil Rights Act of 1990 20

Reply Brief for Petitioner, *Kolstad v. American Dental Association,* No. 98-208 28

OPINIONS BELOW

The opinion of the court of appeals is reported at 213 F. 3d 933 (6th Cir. 2000), and is set out at pp. 81-104 of the Joint Appendix. The order of the court of appeals denying rehearing and rehearing en banc, which is not officially reported, is set out at pp. 105-06 of the Joint Appendix. The decision of the district court, dated August 20, 1998, which is reported at 16 F. Supp. 2d 913 (W.D.Tenn. 1998), is set out at pp. 51-78 of the Joint Appendix.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2000. Both parties filed timely petitions for rehearing and suggestions for rehearing *en banc*, which were denied on August 25, 2000. The petition for a writ of certiorari was filed on November 13, 2000. Certiorari was granted on January 8, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(g)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1) as amended, provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to,

reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate.

Section 1981a(a)(1) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides in pertinent part:

> *Civil rights*--In an action brought by a complaining party under 42 U.S.C. 2000e-5 . . . of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 42 U.S.C. 2000e-2, -3, or -16 of the Act, and provided that the complaining party cannot recover under 42 U.S.C. 1981 of the Revised Statutes, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 2000e-5(g) of the Civil Rights Act of 1964, from respondent.

Section 1981a(b)(2) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides:

> *Exclusions from compensatory damages*--Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 2000e-5(g) of the Civil Rights Act of 1964.

Section 1981a(b)(3) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides:

> *Limitations*--The sum of the amount of compensatory damages awarded under this

section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

Section 1981a(c) of 42 U.S.C., enacted as part of the 1991 Civil Rights Act, provides in pertinent part:

> *Jury trial*--If a complaining party seeks compensatory or punitive damages under this section --

(1) any party may demand a trial by jury . . .

STATEMENT OF THE CASE

Petitioner and her husband brought this action in 1995 against DuPont, petitioner's former employer, alleging that she had been discriminated against on the basis of her sex in violation of Title VII of the 1964 Civil Rights Act. The complaint asserted that petitioner had been subjected to repeated harassment from 1987 to 1995, and then dismissed in 1996 because she refused to submit to continued harassment.

The case was tried before the district judge rather than a jury. The district judge concluded that petitioner had indeed been the target of a protracted campaign of gender-based harassment and that DuPont officials had repeatedly refused to take action to stop abuses of which they were well aware. The court awarded Pollard $107,364 in back pay and benefits and $300,000 in compensatory benefits, the maximum permitted in a Title VII action. 42 U.S.C. § 1981a(b)(3). The district judge concluded that the compensatory award was "in fact, insufficient to compensate plaintiff for the psychological damage, pain, and humiliation she has suffered . . . ." (J.A. 77 n. 19). Because the compensatory award already equalled the statutory cap, the court was unable to make any punitive award; the district judge pointedly explained that "absent the statutory cap, the Court would have awarded punitive damages based upon DuPont's repeated failure to remedy this egregious situation." *Id.*

The district court also held that Sixth Circuit precedent precluded it from making any award of front pay. Petitioner offered evidence that reinstatement was impracticable, and the trial judge indicated that he would have ordered front pay had

he been able to do so. (J.A. 68-69). But in *Hudson v. Reno*, 130 F. 3d 1193, 1204 (6th Cir. 1997), the Sixth Circuit had held that front pay awards were within the cap imposed by section 1981a(b)(3). Because the compensatory award alone had already equalled that cap, the trial court concluded that no front pay award was permissible. (J.A. 77 n. 19).

On appeal the Sixth Circuit emphatically affirmed the liability finding, expressing incredulity that DuPont continued to insist that there was "no such harassment and no knowledge by DuPont management." (J. A. 88-89). The appellate court observed that "[i]t is difficult to read the record in this case without sympathy for the plaintiff who endured, without relief, the cruelty of Steve Carney and other male co-workers at DuPont." (J.A. 98-99). It noted that the trial judge "was quite convinced that the witnesses for the plaintiff were trustworthy and the key witnesses for the defense . . . were lying." (J.A. 97).[1]

In the court of appeals petitioner attacked the soundness of the holding in *Hudson v. Reno* that front pay is subject to the section 1981a(b)(3) cap on compensatory damages. The three judges on that panel were persuaded by Pollard's contentions, but were constrained by prior precedent. "We agree with these arguments, but our hands are tied. One panel of this court may not overturn the decision of another panel of this court . . . ." (J.A. 100).

STATEMENT OF THE FACTS

At all relevant times petitioner was an Operator in the hydrogen peroxide production plant owned by DuPont in

---

[1] The trial judge commented from the bench at the end of the trial that he believed that several defense witnesses had lied. Tr. 1267, 1282-83.

Memphis, Tennessee. The plant is a sprawling, outside facility with a complex array of tanks, production units, pipes and laboratories. At any given moment it has thousands of gallons of highly dangerous chemicals; a serious mishap in the operation of the plant could cause a dangerous, potentially fatal explosion. Pollard was the only female employee on the "A" shift, which usually worked nights.

The district court concluded that Pollard was the victim of a "long-term campaign of harassment, intimidation, and isolation . . . by the men on 'A' shift." (J.A. 74)[2]. It was well known that the men on the 'A' shift objected to the employment of women in the hydrogen peroxide unit. (J.A. 55, 71, 84). Steve Carney, the Control Room Operator who led that campaign, "stated that women didn't belong there approximately five times per week, and routinely referred to women as 'bitches' and 'cunts'." (J.A. 71, 84). Petitioner's position as an Operator gave her supervisory authority over several male Assistant Operators, a status which the men found particularly galling. (J.A. 54, 55, 88).

In February of 1994 the men of 'A' shift, led by Carney, began a concerted effort to drive Pollard from her job. (J.A. 54, 84). The harassment stepped up when Pollard, at the request of company officials, spoke to girls at a "Take Your Daughters to Work Day" in April 1994, an event which

---

[2] At the end of the trial, the district judge commented to the last DuPont official who testified:

> "[Y]ou let a bunch of men beat up on a woman in the workplace. . . . You basically let them engage in psychological torture of a person who is strong-willed, smarter than they were, there isn't anybody else on your shift that was as capable as this lady. . . . You surrendered control of this area, three square blocks area to a thug and let him do this to somebody."

Tr. 1265-66.

several of the men openly deplored. (J.A. 54, 84). The harassment continued until July 1995, when Pollard was driven to take medical leave, an event which was openly celebrated at a party held at the plant and attended by both her tormentors and her own supervisor. (J.A. 68, 90).

Beginning in February 1994, the employees on the night shift with Pollard resolutely refused to talk to her, a practice that continued night after night for a year and a half. (J.A. 54-58, 62-64, 68, 84-85).[3] At Carney's direction, Pollard's own subordinates refused to obey any of her instructions unless Carney told them to do so. (J.A. 60, 84). Although all the other 'A' shift workers ate together during their breaks, petitioner was not permitted to join them. (J.A. 55, 84). If petitioner entered the break room at the peroxide facility, all the other employees would leave, usually muttering in a hostile manner under their breaths. (J.A. 55). As the Control Room Operator, Carney monitored the equipment which would reveal a malfunction in the production facility. Carney repeatedly gave Pollard false reports of equipment failures, sending her running through the dark and dangerous facility. (J.A. 58, 85-86). Even more seriously, Carney on several occasions deliberately failed to tell Pollard about actual malfunctions in the equipment for which she was responsible. (J.A. 58-59, 86).

This malicious refusal to communicate posed a serious danger to the plant, and to Pollard personally. Petitioner complained in vain to the men and to her supervisor that the lack of communication involved a risk of a chemical spill or explosion. (J.A. 60-61, 86-87). At company sponsored meetings of female employees, petitioner told her colleagues, some of whom were managers, that "[s]he was concerned that

---

[3] One employee would on occasion speak secretly to Pollard if none of the other men were present. (J.A. 84).

something would happen that would endanger her and they would not tell her." (J.A. 63-64, 87).

The men also engaged in concerted activity to sabotage Pollard's work. One of her critical responsibilities was to test the contents of hydrogen peroxide tanks after a device known as a vaporizer was removed; Pollard would designate the point when her subordinates were to remove the vaporizers and would then test the tanks at the appropriate time. On at least seven occasions, at Carney's direction, Assistant Operators removed the vaporizers ahead of schedule and deliberately did not tell petitioner. This misconduct prevented the facility from having sufficient peroxide ready for timely delivery and created the appearance that Pollard was at fault. (J.A. 60, 86-87).

On one occasion when the employees were leaving the plant, Carney used his truck to try to force petitioner's car off the road. (J.A. 63, 87). The tires on the bicycle Pollard used at the plant were slashed. (J.A. 61, 87). At times Carney would trigger false alarms while petitioner was heating food in the break room; when she ran out into the facility to correct the non-existent problem, other employees would turn up the stove to ruin her food. (J.A. 58, 86). When their duties forced the men to be in the same room as petitioner, they would make explicit, at times crude derogatory remarks about women. (J.A. 55-56, 85). In late July 1995 Pollard discovered in her locker a highlighted copy of a Bible verse reading "A woman should learn in quietness and full submission. I do not permit a woman to teach or have authority over a man, she must be silent." (J.A. 67, 90). The trial judge held these events had created "a pervasively hostile environment" (J.A. 73) and that there was "absolutely no doubt in the Court's mind that the harassment of plaintiff was based on her gender." (J.A. 71).

The district court also concluded that company supervisors were well aware of this campaign of harassment, and did nothing to stop it. "This is a case of wretched indifference to an employee who was slowly drowning in an environment that was completely unacceptable, while her employer sat by and watched. Plaintiff repeatedly complained to DuPont management to no avail." (J.A. 76).

Pollard complained again and again to her shift supervisor, David Swartz. Swartz had personal knowledge of much of the abuse. (J.A. 56-58, 60-61, 63, 75, 93-94). Often Swartz simply did nothing in response to Pollard's objections. Although Swartz testified that in one instance he had talked to the men on 'A' shift about their conduct, most could not recall his having actually done so. (J.A. 57). When Carney was verbally abusive to Pollard in the presence of Swartz, she asked Swartz if he was going to continue to permit that treatment; Swartz's only response was to end the meeting. (J.A. 63, 87-88). Carney testified that Swartz had abandoned efforts to correct Carney's behavior because "he knows I'm hardheaded" and would persist in that misconduct. (J.A. 85)[4]. Swartz conducted no investigation of Carney's attempt to force Pollard's car off the road (J.A. 63, 66, 87), and pursued no investigation of the tire-slashing and false alarm incidents once Carney denied culpability. (J.A. 66, 88).

Pollard also complained to Swartz's superior, Beth Basham, who had overall responsibility for the peroxide unit. Basham conceded that she "knew there was a real problem in

---

[4] One company official told the men, "You don't have to talk to her socially." In a comment at the end of trial to a company manager, the judge observed: "[T]hey took that as a license to engage in the most flagrant type of conduct, which is contrary to our laws. You gave them the green light, and you can't do that, and you shouldn't have done it." Tr. 1264.

the peroxide area of the male workers accepting the role of a female in the area" and that she "was of the firm belief that plaintiff had been harassed on account of her sex in the peroxide area." (J.A. 64). Basham, however, never investigated the situation, never wrote any report about the problem to upper management, and "could not recall" if she had ever discussed the manner informally with anyone at DuPont headquarters. (J.A. 65).

At other times Pollard complained to Bernie Scales, a diversity representative from DuPont headquarters, Bob Shaw[5], the employee relations manager for the plant, Lee Ann Rice, a human resources manager at the plant, and Gary Fish, a plant shift supervisor. (J.A. 65-66). Scales in turn took the matter up with Gary Lewis, the plant manager. (*Id.*). With the exception of a single conversation between Shaw and Carney, which had no lasting effect, none of these managers took effective action to redress Pollard's complaints. "Even after Bernie Scales returned to Wilmington with knowledge of plaintiff's concerns, no one from DuPont headquarters ever came to the Memphis plant to investigate plaintiff's allegations." (J.A. 66).

> In spite of all of the complaints plaintiff made against him, and the fact that the situation did not improve, Steve Carney never received a formal written reprimand, was never suspended from his job, and was never transferred to another shift, demoted, or terminated.

(J.A. 76).

---

[5] There was considerable evidence that Shaw had personal knowledge of the harassment. Tr. 1273-75, 1279.

After eighteen months of withering abuse, and in the face of the company's adamant refusal to act, Pollard finally went on temporary medical leave in July of 1995. "After Pollard left 'A' shift, the entire shift, including supervisor David Swartz, held a party. They taped balloons to the ceiling and had a fish fry. The purpose of the party was to celebrate Pollard's departure, as Carney admitted in his testimony. Carney said at the party, 'Glad the bitch is gone, glad the bitch is not coming back.' David Swartz told Carney to shut up, that he did not need to hear Carney saying those things in case of future investigations concerning Pollard." (J.A. 68, 90).

After Pollard went on medical leave, she had several discussions with company officials about the possibility of returning to work. A DuPont psychologist concluded that the effect of the harassment was so severe that Pollard could not return to work at DuPont. (J.A. 68-69, 90-91). Shaw met with Pollard and warned her, "I just don't want you to come back to work with the misconception that things are going to be a lot different, a lot better." (Tr. 121). Pollard expressed a willingness to return to the plant if she would not have to work with the harassers who had driven her from her job seven months earlier. Company officials, however, rejected Pollard's request for an assurance that she would not have to work with Carney. When Pollard refused to resume work under those conditions, DuPont fired her. (J.A. 69, 91, 94).

The impact on petitioner of this prolonged and severe harassment was profound. "[S]he suffered from nightmares, fear of crowds, nausea, anxiety, and sleeplessness. A psychologist and a psychiatrist who saw plaintiff both concluded that she suffered from post-traumatic stress disorder." (J.A. 74).

SUMMARY OF ARGUMENT

Section 1981a(b)(2) expressly defines the scope of "compensatory damages" under that section in a manner that excludes front pay:

> *Exclusions from compensatory damages*--Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section [706(g)] of the Civil Rights Act of 1964.

When section 1981a was enacted in 1991, there was a widespread consensus that front pay was indeed "relief authorized under section [706(g)]." Dozens of decisions in eleven circuits, including the Sixth Circuit, had by that year recognized the availability of front pay awards under Title VII. See Appendix A.

"When . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). In the instant case knowledge need not merely be presumed; the legislative history of section 1981a contains repeated references to the availability of front pay under section 706(g), including by an Assistant Attorney General and by the United States Commission on Civil Rights.

The 1991 Civil Rights Act states that its purpose is to provide "additional remedies" for intentional discrimination. If, however, front pay were treated as part of compensatory damages and thus subject to the caps in section 1981a(b)(3), front pay relief would be limited in a manner that was not true prior to 1991. The result would be that discrimination victims

such as petitioner would receive reduced, not additional, remedies.

The Sixth Circuit erred in reasoning that the section 1981a(b)(3) cap applies to front pay because it limits "future pecuniary losses." That provision does not place a cap on all Title VII monetary awards, but restricts only "compensatory damages *awarded under this section.*" (Emphasis added). Since front pay, by virtue of section 1981a(b)(2), simply is not part of compensatory damages under section 1981a, front pay is not subject to the section 1981a(b)(3) limitations.

This interpretation of the language of section 1981a is consistent with its legislative history. The original opponents of the damage provision never advocated capping existing section 706(g) monetary relief, and the original proponents never favored permitting juries to determine backpay or front pay awards. The language contained in section 1981a(b)(2) and 1981a(b)(3), originally drafted by Senator Danforth, was intended as a compromise of the previous positions of the two contending sides.

Front pay is a practical and important alternative to reinstatement where a trial court concludes that reinstatement cannot be effectuated, or should be delayed. Where there is no vacancy into which a discrimination victim can be reinstated, the lower courts have long regarded front pay as preferable to bumping an incumbent employee in order to create a vacancy. *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 267-70 (4th Cir. 1976). If the cap in section 1981a(b)(3) precluded a front pay award in a given case, that would compel the lower courts to resort to otherwise disfavored forms of injunctive relief.

INTRODUCTION

Title VII forbids an employer from discriminating in hiring, promotions or dismissals on the basis of gender, race, national origin or religion. When violations of this prohibition occur, courts will where possible order that the victim be reinstated into to the position in question. In practice, however, reinstatement often must be delayed until a vacancy exists, and sometimes simply is not feasible at all. When these remedial problems arise, the lower courts have for a quarter century ordered awards of front pay, based on the wage the employer would have paid the victim had immediate reinstatement been directed. "[F]ront pay is . . . the monetary equivalent of reinstatement, to be given in situations where reinstatement is impracticable or impossible." *Kramer v. Logan County School District*, 157 F. 3d 620, 626 (8th Cir. 1998).

Prior to 1991 the monetary relief authorized in a Title VII action was back pay and "any other equitable relief as the court deems appropriate."[6] 42 U.S.C. § 2000e-5(g). These provisions of section 706(g) were long understood to authorize an award equal to the difference between a discrimination victim's actual income and the wage that he or she would have received but for the proven discrimination. Under the terminology that has prevailed in the lower courts for two decades, such awards for the period prior to the entry of judgment in the district court have been denoted "backpay"; when such an award is made for a period of time

---

[6] The language regarding "any other equitable relief" was added in 1972. The Conference Report regarding this provision explained that the amendment was "intended to give the courts wide discretion in exercising their equitable power to fashion the most complete relief possible." 118 Cong. Rec. 7166, 7168 (1972).

after final judgment, it is referred to as "front pay."[7] Front pay is "in essence, a continuation of back pay under § 706(g) beyond the date of judgment." 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1815 (3d ed. 1996).[8]

---

[7] Lower courts occasionally refer to such orders in other terms, *e.g.*, "additional backpay." *Suggs v. Servicemaster Education Food Management*, 72 F. 3d 1228, 1234 (6th Cir. 1996).

[8] The earliest reported case using this term appears to be *White v. Carolina Paperboard Corp.*, 1975 WL 250 *8 (W.D.N.C.), *aff'd* 564 F. 2d 1073, 1077, 1087 (4th Cir. 1977). In earlier Title VII cases monetary awards intended to redress the post-judgment effect of discrimination were characterized as "back pay" or "future pay". *See, e.g., Bush v. Lone Star Steel Co.*, 373 F. Supp. 526, 538 (E.D.Tex. 1974); *United States v. United States Steel Co.*, 371 F.Supp. 1045, 1057-63 (N.D.Ala. 1973).

The use of front pay awards in employment discrimination cases has been the subject of scholarly commentary. 2 B. Lindemann & P. Grossman, *Employment Discrimination Law*, 1815-21 (3d ed. 1996); 5 L. Larson, *Employment Discrimination* § 92.12 (2d ed.); S. Grebeldinger, *"The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay"*, 1996 U.Ill. Law. Rev. 319 (1996); Note, *"Making Plaintiffs Whole: The Need for Front Pay Under the ADEA and Other Antidiscrimination Statutes"*, 49 Law & Contemp. Probs. 238 (1986); Case Comment, *"Civil Rights--Front Pay Adopted as Available Remedy Under the Age Discrimination in Employment Act"*, 20 Suffolk U.L.Rev. 681 (1986); M. Kimler, *"Front Pay As An Appropriate Remedy Under the Age Discrimination in Employment Act"*, 32 Wayne L. Rev. 115 (1985); P. Janovsky, *"Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act"*, 53 Fordham L.Rev. 579 (1984); Note, *"Front Pay--Prophylactic Relief Under Title VII of the Civil Rights Act of 1964"*, 29 Vand. L.Rev. 211 (1976).

Front pay, like back pay, may include all aspects of the compensation paid by an employer, such as medical or retirement benefits.

This Court has on several occasions noted the existence of front pay relief.[9]

The 1991 Civil Rights Act supplemented this Title VII remedial scheme by authorizing awards of compensatory and punitive damages for intentional discrimination. 42 U.S.C. § 1981a. The 1991 Act imposed a cap, the amount of which depends on the size of a defendant's workforce, on the sum of the punitive damages and of certain elements of compensatory damages. 42 U.S.C. § 1981a(b)(3). In any case in which compensatory or punitive damages are sought, either party may demand a jury trial. 42 U.S.C. § 1981a(c).

The question presented is whether front pay is part of the compensatory damages authorized by, and thus subject to the limitations and procedures of, section 1981a. That question is of practical importance for two distinct reasons. First, as here, if the punitive and compensatory relief otherwise awarded against an employer already exceed the statutory cap, classification of front pay as part of compensatory damages would preclude any award of front pay. Second, classification of front pay as compensatory damages would mean that there would be a right to a jury trial to determine whether, and how much, front pay should be awarded. Employers, which usually disfavor jury trials, have

---

[9] *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 361 (1995)(ADEA); *United States v. Burke*, 504 U.S. 229, 239 n. 9 (1992)(Title VII); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 777 n. 38 (majority opinion), 781 (Burger, C.J., dissenting)(1976)(Title VII).

Several members of this Court participated in decisions regarding front pay while serving on a court of appeals. *Powers v. Grinnell Corp.*, 915 F. 2d 34, 42 (1st Cir. 1990)(ADEA)(opinion joined by Breyer, J.); *Lander v. Lujan*, 888 F. 2d 153, 159 (D.C.Cir. 1989)(Ginsburg, J., concurring); *Fadhl v. City and County of San Francisco*, 741 F. 2d 1163 (9th Cir. 1984)(opinion for the court by Kennedy, J.).

in this circumstance argued that front pay should not be treated as compensatory damages.[10]

I. THE LANGUAGE OF SECTION 1981a PRECLUDES TREATING FRONT PAY AS PART OF COMPENSATORY DAMAGES

(1) The language of section 1981a is largely dispositive of the question in this case. Subsection (b)(2) expressly defines the scope of "compensatory damages" under that section.

> *Exclusions from compensatory damages*-- Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section [706(g)] of the Civil Rights Act of 1964.

Subsection (a)(1) provides that compensatory and punitive damages are "in addition to any relief authorized by section [706(g)]." When section 1981a was enacted in 1991, there was a widespread consensus that front pay was indeed "relief authorized under section [706(g)]." More than forty decisions in eleven circuits, including the Sixth Circuit, had by that year recognized the availability of front pay awards under Title VII; those decisions are set forth in Appendix A to the brief. In *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976), this Court had noted the possible utilization

---

[10] *McCue v. State of Kansas, Dept. of Human Resources*, 165 F. 3d 784, 790-92 (10th Cir. 1999), *rev'g* 948 F. Supp. 965, 966-68 (D.Kan. 1996).

If front pay is now part of compensatory damages, that might affect the tax status of such payments under the Internal Revenue Code. *See United States v. Burke*, 504 U.S. 229, 241 n. 12 (1992).

of front pay in Title VII cases. 424 U.S. at 777 n. 38 (majority opinion), 781 (Burger, C.J., dissenting); a number of lower courts read *Franks* as approving what was in any event an uncontroverted form of relief under section 706(g).[11] In an Enforcement Guidance issued shortly after the adoption of the 1991 Act, the EEOC concluded that front pay is not part of compensatory damages under section 1981a because front pay was by 1991 a well established section 706(g) remedy.[12]

"When . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978). In the instant case knowledge need not merely be presumed; the legislative history of section 1981a contains repeated references to the availability of front pay under section 706(g). Early in the Senate hearings on the bill, Assistant Attorney General Ayer specifically called the existence of front pay to the attention of the Senate Judiciary Committee.[13] In the arguments regarding

---

[11] *EEOC v. Safeway Stores, Inc.*, 634 F. 2d 1273, 1281 (10th Cir. 1980); *Ford v. Rigidply Rafters, Inc.*, 984 F. Supp. 386, 388 (D.Md. 1991); *Gallo v. John Powell Chevrolet, Inc.*, 779 F. Supp. 804, 814 (M.D.Pa. 1991); *McCann v. Litton Systems, Inc.*, 767 F. Supp. 127, 130 (S.D.Miss 1991).

[12] EEOC Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991, I, II, n. 9, II A (1), *reprinted in* BNA EEOC Compliance Manual, N:6071 *et seq*.

[13] Hearing Before the Senate Committee on Labor and Human Resources on S. 2104, 101st Cong., 2d Sess. ("1990 Senate Hearings"), 109-110 (Title VII provides "equitable remedies relating to back pay and reinstatement and front pay, which were intended not to include compensatory and punitive damages.")

the proposal to authorize compensatory damages in Title VII actions, opponents argued that the existing availability of front pay supported their contention that additional remedies were unnecessary[14], while supporters, including the United States Commission on Civil Rights, insisted that front pay awards did not provide sufficient redress.[15]

---

[14] 1990 Senate Hearings 201 ("Additional problems created by Section 8 of the Bill arise from the fact that it would impose compensatory damages and punitive damages on top of an existing remedial scheme which already grants to successful plaintiffs the right to recover lost wages, back pay and reinstatement or *front pay*. Since the issues of Title VII violation and reinstatement or *front pay* (where reinstatement is not feasible) are issues for the court--not the jury--while compensatory and punitive damages claims are jury questions, a serious and complex issue involving judicial economy arises.")(statement of David Maddux on behalf of the National Retail Federation)(emphasis added); Hearings on H.R 1 Before the House Committee on Education and Labor, 102d Cong., 1st Sess.("1991 House Hearings"), 251 ("Title VII provides complete relief for the concrete economic harm suffered by victims of employment discrimination. Courts can order back pay; they can order *front pay*; they can order a person reinstated to a job . . . ."")(statement of Zachary Fasman)(emphasis added); Hearings on H.R. 4000 before the House Committee on Education and Labor and the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 101st Cong., 2d Sess. ("1990 House Hearings"), v. 2, 223 (testimony of David Maddux), v. 3, 13 ("For particular claimants, [Title VII and the ADEA] provide 'make-whole' remedies designed to restore them to the status they would have enjoyed had the unlawful act not occurred--reinstatement or hiring, back pay, and *front pay* where appropriate")(statement of Edward Potter)(emphasis added), 46 (report of the National Foundation for the Study of Employment Policy).

[15] 1991 House Hearings 147 ("The equitable remedies of Title VII, reinstatement and *front and back pay*, compensate for one kind of loss, but they cannot compensate for the emotional and career damage to one's life's work. They are also not enough of a deterrent - just a cost of doing business")(statement of Nancy Ezold)(emphasis added), 593 ("In some cases, courts have awarded discrimination victims '*front pay*' where the equitable remedy of

This interpretation of section 1981a is supported by the congressional findings and statement of purpose adopted as part of the 1991 Act. Congress concluded that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace", and recited that the legislation was adopted to "provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." 105 Stat. 1071. Rather than enhancing the remedies available for intentional discrimination, as Congress intended when it adopted section 1981a, reclassifying front pay as a form of compensatory damages would have imposed on such awards a cap that did not exist prior to 1991. In cases where awards of front pay alone exceeded the subsection (b)(3) caps,[16] the effect of the

---

reinstatement is not appropriate, usually because the working conditions are exceptionally contentious and not expected to improve with an injunction. . . . *Front pay* has also been deemed an appropriate remedy when a deserved promotion is not readily available to a plaintiff because innocent workers would be displaced through no fault of their own. . . . However, it should be noted that courts do not automatically award *front pay* when reinstatement is not proper.")("Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy: Impact Update", A Report by the National Women's Law Center)(emphasis added), 598 (describing "lump sum front pay award"); 1990 House Hearings, v. 3, p. 249 ("Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy"), 606 ("Many forms of employment discrimination, such as on-the-job harassment, are currently left undeterred by Title VII, because employers cannot be assessed monetary damages in these situations. Even discrimination that results in backpay or *frontpay* awards is not sufficiently deterred under current law, because most instances of discrimination go unprosecuted.")(Report of the United States Commission on Civil Rights on the Civil Rights Act of 1990)(emphasis added).

[16] The limitations imposed by subsection (b)(3) can be as low as $50,000. Lump sum front pay awards greater than that amount are not uncommon. *Lewis v. Quaker Chemical Corp.*, 228 F. 3d 1152 (table), 2000 WL 1234356 * 6 (6th Cir. 2000)($179,469.12);

1991 Act under the Sixth Circuit's interpretation would be to reduce the total monetary relief awarded to a discrimination victim and to provide to the victims in such cases no new compensatory or punitive relief at all. In the instant case there was undisputed testimony that the total of petitioner's prospective lost wages would far exceed the subsection (b)(3) cap. (Tr. 601-02, 614-15). In addition, because under section 1981a compensatory damages can only be awarded in cases of intentional discrimination, 42 U.S.C. § 1981a(a)(1), reclassifying front pay as a form of compensatory damages would preclude front pay awards altogether in disparate impact cases.[17]

The use of the phrase "compensatory damages" to describe the new remedy provided by section 1981a is by itself inconsistent with the contention that front pay is included in that remedy. Compensatory damages are by their very nature mandatory; where a violation is shown, the jury or other trier of fact *must* award in compensation an amount equal to the loss occasioned by that violation. *Smith v. Wade*, 461 U.S. 30, 52 (1983). Front pay awards, on the other hand, have always been matters of discretion. The decision to grant or deny an injunction ordering reinstatement requires a classic exercise of equitable discretion; an award of

---

Becker v. ARCO Chemical Co., 207 F. 3d 176, 179 n. 2 ($380,000); *Passantino v. Johnson & Johnson Consumer Products*, 212 F. 3d 493, 504 (9th Cir. 2000)($2,000,000); *Gotthardt v. National Railroad Passenger Corp.*, 191 F. 3d 1148, 1151 (9th Cir. 1999)($603,928.37); *Skalka v. Fernald Environmental Restoration Management Corp.*, 178 F. 3d 414 (6th Cir. 1999)($529,416); *Sullivan v. National Railroad Passenger Corp.*, 170 F. 3d 1056, 1058 (11th Cir. 1999)($458,166); *Jackson v. City of Cookeville*, 31 F. 3d 1354, 1356 (6th Cir. 1994)($467,192).

[17] Front pay awards had been made in such cases prior to the 1991 Act. *E.g.*, *Association Against Discrimination v. City of Bridgeport*, 647 F. 2d 256, 269 n. 9 (2d Cir. 1981).

immediate reinstatement precludes front pay. Even if reinstatement is denied or delayed, the decision whether to award or withhold front pay, like any equitable remedy, remains a matter of judicial discretion[18]. Although back pay is rarely denied under *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421-25 (1975), the appellate courts have repeatedly upheld as within the discretion of the trial court denials of front pay that were consistent with the remedial and deterrent purposes of Title VII. See Appendix C. If, however, front pay were now an element of compensatory damages, front pay awards would become mandatory whenever wage losses continued after the entry of final judgment.

(2) The Sixth Circuit reasoned that the subsection (b)(2) exclusion did not apply to front pay because section 706(g) refers expressly to backpay, but makes no specific mention of front pay. *Hudson v. Reno*, 130 F. 3d at 1203. This argument simply ignores the plain language of subsection (b)(2), which excludes not only the specifically mentioned back pay (and interest on backpay) but also "any other type of relief authorized under section [706(g)] of the Civil Rights Act of 1964." Clearly the sole purpose of this clause is to encompass all the other types of monetary relief not expressly listed; it requires only that such relief be "authorized" by section 706(g), not that it be "specifically 'authorized' by § 706(g)." *Hudson v. Reno*, 130 F. 3d at 1203. If, as the

---

[18] *Erebia v. Chrysler Plastic Products Corp.*, 863 F. 2d 47 (table), 1988 WL 125356 *3 (6th Cir. 1988); *Floca v. Homcare Health Services, Inc.*, 845 F. 2d 108, 112 (5th Cir. 1988); *Green v. USX Corp.*, 843 F. 2d 1511, 1531 (3d. Cir. 1988); *Pitre v. Western Elec. Co., Inc.*, 843 F. 2d 1262, 1278 (10th Cir. 1988); *Spears v. Board of Educ. of Pike County, Ky.*, 843 F. 2d 882, 886 (6th Cir. 1988); *Nord v. United States Steel Corp.*, 758 F. 2d 1462, 1473 n. 12 (11th Cir. 1985); *Dillon v. Coles*, 746 F. 2d 998, 1006 (3d Cir. 1984); *Ingram v. Madison Square Garden Center, Inc.*, 709 F. 2d 807, 813 (2d Cir. 1983).

Sixth Circuit argued, the subsection (b)(2) exclusion applies only to the two remedies that are expressly listed in that subsection, then these last seventeen words of the subsection would be stripped of any operational significance.

The Sixth Circuit asserted that front pay was not within the subsection (b)(2) exclusion because in its view front pay is a "legal" rather than an equitable remedy. *Hudson v. Reno*, 130 F. 3d at 1203-04. Were that the case, front pay would indeed be outside the scope of the subsection (b)(2) exclusion of section 706(g) remedies, because section 706(g) itself only authorizes equitable relief. But if that were so, front pay would never have been a permissible remedy at all under Title VII prior to 1991. The Sixth Circuit itself, however, had on repeated occasions prior to 1991 recognized the availability of front pay under Title VII[19], and, like numerous other circuits[20], had previously characterized such awards as "equitable".[21] The Sixth Circuit decision in *Shore*

---

[19] *Erebia v. Chrysler Plastic Products Corp.*, 863 F. 2d 47 (table), 1988 WL 125356 * 2 (6th Cir. 1988); *Spears v. Board of Educ. of Pike County, Ky.*, 843 F. 2d 882, 885-86 (6th Cir. 1988); *Shore v. Federal Express Corp.*, 777 F. 2d 1155, 1159-60 (6th Cir. 1985); *Day v. Wayne County Bd. of Auditors*, 749 F. 2d 1199, 1201 (6th Cir. 1984). *Hudson v. Reno* itself emphasized that front pay had been available under Title VII prior to 1991. 130 F. 3d at 1203.

[20] *E.g.*, *Simmons v. Marsh*, 917 F. 2d 23 (table), 1990 WL 163059 *5 (4th Cir. 1990); *King v. Staley*, 849 F. 2d 1143, 1145 (8th Cir. 1988); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

[21] *Erebia v. Chrysler Plastic Products Corp.*, 863 F. 2d 47 (table), 1988 WL 125356 * 2 (6th Cir. 1988); *Gutzwiller v. Fenik*, 860 F. 2d 1317, 1333 (6th Cir. 1988); *Mitroff v. Xomoc Corp.*, 797 F. 2d 271, 274 (6th Cir. 1986).

Since 1991 the Sixth Circuit has continued to characterize front pay as an equitable remedy. *Thurman v. Yellow Freight Systems, Inc.*, 97 F. 3d 833, 834 (6th Cir. 1996); *Shore v. Federal*

v. Federal Express, 777 F. 2d 1155 (6th Cir. 1985), is one of the leading pre-1991 cases approving front pay under Title VII; it was cited both in the legislative hearings on the 1991 Civil Rights Act[22] and by this Court in *United States v. Burke*, 504 U.S. 229, 239 n. 9 (1992) as illustrating the availability of front pay under section 706(g).[23]

Express Corp., 42 F. 3d 373, 377 (6th Cir. 1994).

The Sixth Circuit analyzed that issue at length in *Schwartz v. Gregori*, 45 F. 3d 1017 (6th Cir. 1995). This Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), held that only equitable relief is available in an action brought under section 502(a)(3) of ERISA. In the wake of *Mertens*, the Sixth Circuit concluded that front pay was an equitable remedy, and thus remained available in such actions, relying on that circuit's "historical assessment" that front pay was equitable relief in Title VII cases. 45 F. 3d at 1023.

[22] 1991 House Hearings, p. 593 n.4; 1990 House Hearings, p. 249 n. 4.

[23] In support of its contention that Title VII front pay is a legal remedy, the court in *Hudson v. Reno* asserted that in prior decisions, although the availability of front pay had been decided by the trial court, the amount of the front pay had been determined by a jury. 130 F. 3d at 1204. Two of the cited cases, however, arose under the Age Discrimination in Employment Act, which contains an unusual provision, not present in Title VII, authorizing a jury trial of "any issue of fact in any such action". 29 U.S.C. § 626(c)(2). *Roush v. KFC Nat. Management Co.*, 10 F. 3d 392 (6th Cir. 1993); *Fite v. First Tennessee Production Credit Ass'n*, 861 F. 2d 884 (6th Cir. 1988). Both of these decisions hold that the district court's "approval of the prospective damage award . . . as returned by the jury . . . was not an abuse of discretion." *Fite*, 861 F. 2d at 893; *Roush*, 10 F. 3d at 398 (emphasis omitted). This unusual phrasing suggests the jury's role may have been advisory. The courts of appeals are divided about whether in ADEA cases judges or juries should determine the amount of front pay.

In the third cited case, which arose under Title VII, the Sixth Circuit had directed the trial judge on remand to determine the amount of front pay. *Suggs v. Servicemaster Education Food Management*, 72 F. 2d 1228, 1234-35 (6th Cir. 1996).

The Sixth Circuit also suggested that front pay is part of compensatory damages, and subject to the section 1981a cap, because those limitations in section 1981a(b)(3) apply to "future pecuniary losses." *Hudson v. Reno*, 130 F. 3d at 1203. But this analysis simply ignores the words that precede the phrase: "future pecuniary losses" in subsection (b)(3): "The sum of the amount of *compensatory damages awarded under this section* for future pecuniary losses [and other listed items] shall not exceed [certain specified ceilings]." (Emphasis added). Section 1981a(b)(3) is not a limitation on the sum of *all* monetary awards in employment discrimination cases or even of all awards under Title VII, but is only a cap on the sum of certain specified elements of the "compensatory damages awarded under this section" together with any punitive damages. Subsection (b)(2) expressly defines what *are* "compensatory damages . . . under this section" to exclude all remedies authorized by section 706(g). Subsection (b)(3) in turn is simply a limit on the awards of compensatory damages as defined in subsection (b)(2). Because front pay is outside of "compensatory damages . . . under this section" by virtue of the subsection (b)(2) definition, it is not among the items limited by the subsection (b)(3) cap on "compensatory damages . . . under this section."

This limitation on the significance of subsection (b)(3) is illustrated by the existence in many race discrimination cases of claims under 42 U.S.C. § 1981. Compensatory and punitive damages have long been available to plaintiffs in section 1981 cases. *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975). Section 1981 compensatory awards can be made for all of the injuries listed in subsection (b)(3)--future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. But the liability limitations in subsection (b)(3) are clearly inapplicable to a section 1981

claim, since that subsection caps only compensatory and punitive damages "awarded under this section", *i.e.* under section 1981a. Monetary relief under section 1981, like monetary relief under section 706(g), is unaffected because it simply is not awarded under section 1981a at all.

The Sixth Circuit suggested that the "future pecuniary losses" clause of subsection (b)(3) would be meaningless if it did not include front pay. *Hudson v. Reno*, 130 F. 3d at 1204. As the EEOC has correctly noted, however, the types of injuries that constitute future pecuniary losses subject to the subsection (b)(3) caps are the same as the past pecuniary losses which the subsection does not cap: "[p]ecuniary losses include, for example, moving expenses, job search expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses that are incurred as a result of the discriminatory conduct."[24] These are precisely the types of pecuniary losses repeatedly cited in the legislative history of the 1991 Act as examples of injuries that would for the first time be redressed if Title VII were amended to authorize compensatory damages.[25]

II. THE LEGISLATIVE HISTORY OF SECTION 1981a DEMONSTRATES THAT CONGRESS DID NOT INTEND TO TREAT FRONT PAY AS PART OF COMPENSATORY DAMAGES

---

[24] EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, II A (1), *reprinted in* EEOC Compliance Manual, N: 6071, N: 6078 (footnote omitted).

[25] H.R.Rep. 102-40(I), pp. 65, 67, 74; H.R. Rep. 102-40 (II), p. 25; H.R.Rep. 101-644 (part 1), pp. 38, 76; H.R.Rep. 101-644 (part 2), p. 32; S. Rep. 101-315, p. 30.

The manner in which subsections (b)(2) and (b)(3) were framed, and the larger context of the protracted legislative process leading to the adoption of the 1991 Act, make clear that Congress intended that all monetary relief already available under section 706(g), including front pay, be outside the scope of the compensatory damages authorized (and capped) by that Act. Over the course of almost two years of at times rancorous debate, proposals and counter-proposals, no faction ever proposed treating front pay as part of compensatory damages; for the reasons set out below, classifying front pay as damages would have had consequences which neither side would have wanted.

A provision for compensatory and punitive damages was included in the first version of the bill, offered in February 1990 by Senator Kennedy.[26] Section 8 of S. 2104 would have amended section 706(g) by adding at the end of that section language authorizing awards of compensatory and punitive damages, and providing for jury trials where those remedies were sought. The proposed new provision stated expressly that the compensatory damages were "in addition to the relief authorized by the preceding sentences of the subsection [706(g)]" and that compensatory damages did "not include backpay or any interest thereon." Although other provisions of S. 2104 were modified in committee or on the floor of the Senate in 1990, this language remained unchanged during that year. In 1990 the House and Senate each passed civil rights bills, and then approved by substantial majorities a modified bill adopted by the conference committee. All three of the bills approved in 1990 contained the same section 8 that had been included in the original version of S. 2104, stating that the compensatory damages were "in addition to" remedies authorized by section 706(g).

---

[26] S. 2104, 101st Cong., 2d Sess.

Both the House and Senate reports in 1990 explained that the scope of compensatory damages under section 8 was limited to avoid "the possibility of duplicative recoveries."[27] The committees anticipated that juries would ordinarily be determining the amount of any compensatory damages, while judges would continue to award whatever monetary relief was already authorized by section 706(g). A limitation on the scope of compensatory damages was thus needed to assure that juries were instructed in a manner which assured that they did not, as part of those damages, provide redress for wage or other claims being redressed by the court. Because the bills approved by the House and Senate in 1990 had no cap on compensatory damages, there were no provisions analogous to subsection (b)(3). In that context, the section 8 limitation on the scope of compensatory damages served to protect the interests of employers in avoiding double recovery. Although a substantial minority of Congress was adamantly opposed to authorizing compensatory damages in Title VII actions, those opponents quite understandably expressed no objection to this limitation on the scope of compensatory damages or to its anti-duplication purpose.

Congressional opponents of section 8 argued that the size of potential compensatory or punitive awards might bankrupt employers, or coerce them into unwarranted settlements, and asserted that juries were likely to make excessive awards.[28] But neither side in the controversy would have wanted section 8 compensatory damages to include front pay. Section 8 opponents would have resisted any such proposal because it would have meant that the juries which

---

[27] H.R. Rep. 101-644 (part 2), p. 36; S. Rep. 101-315, p. 55.

[28] The congressional debates about the wisdom of authorizing jury trials are summarized in the Reply Brief for Petitioner, *Kolstad v. American Dental Association*, No. 98-208, pp. 9-17.

they so distrusted, in addition to determining the amount of the newly authorized relief, could also decide the amount of an award that had previously been determined by a judge. Section 8 supporters never expressed any desire to shift that responsibility from judges to juries, and would have understood that such a proposal would have increased considerably the opposition to their proposal for a new remedy. The justifications for section 8 in the committee reports, floor debates and congressional hearings dealt exclusively with the need to provide additional monetary relief; no suggestion was ever made that remedies already being administered by judges needed to be determined by juries instead.

On repeated occasions in 1990 and 1991, section 8 opponents offered alternative legislative proposals, particularly in response to arguments that then existing law did not provide a significant remedy in harassment cases. At no time, however, did the opponents propose limiting already available monetary relief. During the Senate and House debates, respectively, Senator Kassebaum and Representative Michel offered amendments to the civil rights bill that would have permitted judges in harassment cases to award up to $100,000 in "additional equitable relief."[29] This new monetary remedy was as a practical matter limited to those harassment cases in which front pay could not be awarded.[30]

---

[29] 136 Cong. Rec. 17685-66 (remarks of Sen. Dole); 136 Cong. Rec. 22148-19 (remarks of Rep. Michel).

[30] Both amendments provided that the "additional equitable relief" could not be awarded in any case in which back pay could be awarded. Front pay is by definition a continuation after the date of judgment of the back pay relief provided for losses prior to that date. As a practical matter the only type of discrimination covered by the Kassebaum and Michel proposals was harassment that had not resulted in a dismissal, demotion, or other loss of pay. The

Thus, although under these proposals there was a specific dollar limit on the amount that could be awarded by the trial judge, it was only a limit on the amount of that "additional" relief. Both the Michel and Kassebaum amendments were defeated.

President Bush vetoed the bill which had been approved by Congress in 1990. Included with his veto message was a new proposed alternative to section 8, which again supplemented but did not displace or limit already existing remedies under section 706(g). Unlike the Kassebaum and Michel amendments, the Bush proposal for "additional equitable relief" was not restricted to cases of harassment, but applied to any case of "intentional discrimination." The permissible additional remedy under the Bush alternative was raised to $150,000, but it could be awarded only "if the court finds . . . that an additional equitable remedy beyond those otherwise available is needed."[31] The President's veto message stated expressly that this award of up to $150,000 would be "in addition to existing remedies under Title VII."[32] The President's veto was sustained by the Senate.

When the new Congress convened in early 1991, legislation essentially similar to the vetoed bill was reintroduced; the relevant provisions of section 8 remained

---

sponsors described their proposals in precisely those terms.

[31] Message from The President of the United States Transmitting Alternative Language to S. 2104 As Passed by The Congress, pp. 9-10(1990).

[32] Message from The President of The United States Returning Without My Approval S. 2104, The Civil Rights Act of 1990, p. 1.

unchanged.[33] In March of that year Senator Dole and Representative Michel introduced their own civil rights proposals, with identical provisions for additional monetary relief.[34] Unlike the Bush proposal, the Dole and Michel bills were limited to harassment cases but, unlike the earlier Kassebaum and Dole amendments, were not restricted to cases in which no other monetary relief could be awarded. As was true of the Kassebaum, Bush and previous Michel proposal, these proposals again provided that the relief was to be awarded by the court, rather than by a jury, and the proposals labeled the new monetary relief "equitable." Judges were limited to ordering "equitable monetary awards" of no more than $150,000, but this was expressly "in addition to ordering appropriate equitable relief under subsection (g) of this section", and was permissible only "if the court finds that an additional equitable remedy beyond those available under subsection (g) of this section is justified."[35]

On June 4, 1991, the House rejected the Michel proposal, and the next day again passed a civil rights bill including the same section 8 that had been approved in 1990. The margin of passage, however, was insufficient to overcome another presidential veto. Although supporters and opponents of the legislation differed on a number of issues, in one respect their positions were congruent--supporters had never proposed permitting a jury to determine the amount of the monetary relief already available under section 706(g), and opponents had never proposed imposing a limitation on

---

[33] H.R. 1, 102d Cong., 1st Sess.

[34] H.R. 1375, 102d Cong., 1st Sess.; S. 611, 102d Cong., 1st Sess.

[35] H.R. 1375, § 8(b)(m); S. 611, § 8(b)(m).

section 706(g) awards--awards that had long included front pay.

On June 4, 1991, Senator Danforth introduced a package of legislation[36] which ultimately became the basis for the bill enacted into law in the fall of 1991. The compromise proposal regarding monetary relief was contained in S. 1209, which, like the bills that had previously passed both houses, authorized compensatory damages and jury trials, but which, like the earlier Kassebaum, Bush, Dole and Michel proposals, placed a limitation on the amount of this new relief. S. 1209, as was true of the final legislation, took the form of a new section 1981a, rather than an amendment to section 706(g). Subsection (b)(2) of the proposed amendment, excluding from the definition of compensatory damages all "relief authorized under section 706(g)," was identical to the terms of subsection (b)(2) that ultimately became law, and remained unchanged through several subsequent new bills.[37] Subsection (b)(3) of S. 1209 imposed a cap on compensatory damages, but, unlike the law ultimately adopted, the cap did not apply to future pecuniary losses.[38]

---

[36] Danforth introduced at the same time S. 1207 and S. 1208, the provisions of which, in their original or amended form, became the basis of other portions of the 1991 Act.

[37] In S. 1209 this subsection is headed "Exclusions"; in the final bill the heading is "Exclusions from compensatory damages." This difference is devoid of significance.

The language of subsection (b)(2) appears to have been drawn from the competing prior proposals. The specific exclusion of backpay and interest on backpay was in section 8 of the bills that had previously passed the House and Senate; the generic reference to any other relief "under section 706(g)" mirrors similar language in the Dole and Michel 1991 proposals.

[38] The cap applied to "[t]he amount of compensatory damages awarded under this section against a respondent who is not a government, government agency, or political subdivision, for

Compensatory damages under S. 1209 assuredly would not have included front pay. The language now in subsection (b)(3), on which the Sixth Circuit later relied, was not in the bill. The only consequence that would have attached to treating front pay as part of compensatory damages under S. 1209 would have been that juries, not judges, would have decided whether to make such awards and how large they should be. Such a procedure would have been highly objectionable to the anti-jury opponents of the old section 8, and for that reason had never been suggested by the supporters of the bills which earlier had passed the House and Senate. It is unimaginable that Senator Danforth would have included in what he intended as a compromise proposal a deal-breaking provision that neither side had ever sought.

On June 27, 1991, Senator Danforth, after extended negotiations with the Bush Administration, introduced a new set of bills with more than twenty changes that had been made at the behest of the Administration. The first paragraph of subsection (b)(3) of S. 1409 was, with one exception not relevant here[39], identical to the language now in the first paragraph of section 1981a(b)(3). The significant change from S. 1209 was the inclusion of "future pecuniary losses" in the list of capped compensatory damages. Senator Danforth placed in the Congressional Record a memorandum explaining the "specific concerns [of the administration] and how they were addressed."

---

emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." Later versions deleted the provision regarding government defendants, and extended the cap to cover the total of punitive and certain compensatory damages. The amount of the cap was also altered.

[39] In the version finally adopted by Congress this cap is on the award "for each complaining person."

The Administration requested a cap on future pecuniary damages.

Response: Cosponsors adopted such a cap.[40]

Nothing in this explanation suggests that the administration had sought, or that the cosponsors had adopted, an entirely new definition of "compensatory damages." Rather, the memorandum makes clear that subsection(b)(3) is exactly what it appears to be--a limitation on compensatory damages as previously defined in subsection (b)(2).

Although the language of subsections (b)(2) and (b)(3) did not change after June 27, S. 1409 and the companion compromise bills[41] did not fully resolve the controversy. Neither side at that point had accepted even the proposal regarding damages; other provisions, particularly regarding disparate impact claims, were the subject of another four months of negotiations. On September 24, 1991, Senator Danforth and six Republican Senators introduced S. 1745, which combined in a single bill the proposals, some further modified, that had been in S. 1407, S. 1408 and S. 1409. On October 25, 1991, agreement was reached on a final set of revisions to S. 1745. Most of these alterations related to the disparate impact provisions; the only non-technical change to the damage provision was a slight increase in the amount of caps.[42]

Five days later Senator Danforth and the original six Republican cosponsors of S. 1745 placed in the Congressional

---

[40] 137 Cong. Rec. 16963 (1991).

[41] S. 1407 and S. 1408, 102d Cong. 1st Sess.

[42] In the case of employer with 201-500 employees, the cap was raised from $100,000 to $200,000. Compare S. 1745 §5(b)(3) with 42 U.S.C. § 1981a(b)(3).

Record an "Interpretative Memorandum" regarding the meaning of the provisions of the bill other than the sections regarding disparate impact cases.[43] The Memorandum expressly was "intended to reflect the intent of all of the original cosponsors to S. 1745", an intent of particular significance with regard to subsections (b)(2) and (b)(3), because those provisions had remained unchanged since S. 1745 was first introduced[44]. The Memorandum stated:

> [T]he following limitations . . . are placed on the damages available to each individual complaining party for each cause of action brought under section 1981A:
>
> Such damages cannot include backpay, the interest thereon, frontpay, or any other relief authorized under Title VII:
>
> The amount of nonpecuniary damages, future pecuniary damages and punitive damages shall not exceed [the dollar limitation based on the size of the employer's workforce.][45]

As had been true of the committee reports on the bills passed in 1990 and 1991, the cosponsors continued to regard the exclusion of backpay and front pay from compensatory damages as a protection for defendants. These "limitations

---

[43] An Interpretative Memorandum on that issue, agreed to by Senators Danforth, Dole and Kennedy, had been placed in the record earlier. 137 Cong. Rec. 28680.

[44] The six cosponsors of S. 1745 had earlier cosponsored S. 1209 and S. 1409.

[45] 137 Cong. Rec. 29046.

. . . on the damages available" restricted the items for which juries could award compensatory damages.

Senator Kennedy, in what was the first description of the final bill given after the October 25 compromise, expressly stated on the floor of the Senate that front pay was not part of compensatory damages.[46] A number of Senators who had opposed Kennedy's original bill, including Senator Hatch, disagreed with other portions of Kennedy's speech, particularly regarding disparate impact claims, and so offered in responsive speeches, and in a memorandum of their own, quite different interpretations of certain provisions of the compromise bill. These disagreements led Senator Danforth to offer, and the Senate to approve, an amendment to S. 1745 directing the courts to disregard any statements that had been made regarding "Wards Cove-Business necessity/ cumulation/alternative business practices"[47], all issues related to disparate impact claims. But despite the care with which the speeches of Kennedy and others had been scrutinized, and the alacrity with which Hatch and others rose to disavow any statement with which they disagreed, neither Hatch nor any other member of Congress expressed any disagreement with the insistence of Kennedy, Danforth and the original S. 1745

---

[46] "Compensatory damages do not include backpay, interest on backpay, or any other type o[f] relief authorized under section 706(g) of the Civil Rights Act of 1964, including front pay." 136 Cong. Rec. 28637.

[47] 105 Stat. 1075. ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that related to Wards Cove--Business necessity/cumulation/alternative business practice.")

cosponsors that front pay was not part of compensatory damages.

When the bill reached the House, Representative Edwards placed in the Record a section-by-section analysis which, like the Danforth Memorandum, insisted that front pay was not part of compensatory damages.

> Damages awarded under section [1981a] cannot include remedies already available under Title VII including backpay, the interest thereon, front pay, or any other relief authorized under Title VII.[48]

Although Representative Hyde responded with a lengthy explanatory memorandum of his own[49], he did not assert that front pay was part of compensatory damages.

This lack of disagreement about the exclusion of front pay from compensatory damages reflected the fact that the exclusion served in two important ways to protect the interests of defendants. First, as the earlier committee reports had stressed, such an exclusion was needed to avoid duplicative recovery where a jury awarded compensatory damages and a judge awarded relief available under section 706(g). Second, the exclusion assured that a judge, not a jury, would continue to decide whether front pay should be awarded, and if so how much; that assurance was important to the erstwhile opponents of compensatory damages, who feared that juries were prone to award excessive amounts.

---

[48] 137 Cong. Rec. 30661.

[49] 137 Cong. Rec. 30678-83.

III. TREATING FRONT PAY AS PART OF COMPENSATORY DAMAGES UNDER SECTION 1981a WOULD RAISE SERIOUS PROBLEMS FOR JUDICIAL ENFORCEMENT OF TITLE VII

Treating front pay as part of compensatory damages under section 1981a would interfere with enforcement of Title VII in a manner that Congress did not contemplate and could not have intended.

(1) Confronted as they are with a wide variety of remedial problems, the lower courts have utilized front pay orders to address a number of distinct problems, and have found it necessary to structure those orders in several different ways. The framing of a front pay order has required lower court judges to exercise discretion in four distinct ways.

First, the decision whether to award front pay is inextricably intertwined with the trial judge's decision regarding whether, and in what manner, to order reinstatement, promotion or hiring.[50] "The choice of a [front pay] remedy in lieu of an order that the plaintiff be reinstated rests in the sound discretion of the trial court." *Goss v. Exxon Office Systems Co.*, 747 F. 2d 885, 890 (3d Cir. 1984). Depending on the circumstances of a particular case, lower courts have chosen to order (i) immediate reinstatement, (ii) reinstatement after the completion of any appeals[51], (iii) reinstatement as soon as there is a vacancy in the position in

---

[50] For simplicity we use the term reinstatement to refer to these various types of injunctive relief.

[51] *See Anderson v. Group Hospitalization, Inc.*, 820 F. 2d 465, 473 (D.C.Cir. 1987).

question[52], (iv) reinstatement after several vacancies have occurred, (v) promotion through a series of vacancies until the plaintiff reaches the position he or she would have held absent discrimination, to (vi) give the employer the choice of either reinstating the plaintiff or paying front pay[53], or to (vii) deny reinstatement. Only the first order ends the condition that gave rise to the back pay order and makes consideration of front pay unnecessary.

Front pay is often utilized as an interim measure where the discrimination victim cannot immediately be placed in the position to which he or she is entitled. Where there is no current vacancy in that position, the lower courts have generally avoided "bumping" an innocent employee in order to create a vacancy for the plaintiff, preferring to award front pay (subject to a variety of limitations and deductions) until a vacancy arises by attrition. See Appendix B. Courts also have frequently ordered front pay where reinstatement is impractical, *United States v. Burke*, 504 U.S. 229, 239 n. 9 (1992), such as where there is continuing animus towards the

---

[52] *King v. Staley*, 849 F. 2d 1143, 1145 (8th Cir. 1988); *Pitre v. Western Elec. Co., Inc.*, 843 F. 2d 1262, 1279 (10th Cir. 1988); *Briseno v. Central Technical Community College Area*, 739 F. 2d 344, 348 (8th Cir. 1984); *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 269 (4th Cir.1976).

[53] *E.g., Carter v. Sedgwick County, Kan.*, 929 F. 2d 1501, 1505 (10th Cir. 1991); *Cross v. Board of Ed. of Dollarway, Ark. Sch. Dist.*, 395 F. Supp. 531, 535-36 (E.D.Ark. 1975).

plaintiff[54] or where the past discrimination has been so egregious that the plaintiff cannot return to work.[55]

Second, even where reinstatement has been denied or delayed, an award of front pay remains a matter of district court discretion. Front pay awards raise practical and equitable issues not posed by backpay claims. Trial judges direct such awards where they "will aid in ending illegal discrimination and rectifying the harm it causes." *Shore v. Federal Express Corp.*, 777 F. 2d 1155, 1159 (6th Cir. 1985).[56] In addition to making the discrimination victim whole, front pay may be awarded to insure the efficacy of a reinstatement order by providing the employer with a financial incentive to find a vacancy and reinstate the plaintiff

---

[54] *Bruso v. United Airlines, Inc.*, 2001 WL 87635 *11 (7th Cir.); *Caudle v. Bristow Optical Co., Inc.*, 224 F. 3d 1014, 1019 (9th Cir. 2000); *Farley v. Nationwide Mutual Insurance Co.*, 197 F. 3d 1322, 1338 (11th Cir. 1999); *Green v. USX Corp.*, 843 F. 2d 1511, 1531 n. 17 (3d Cir. 1988); *Thorne v. City of El Segundo*, 802 F. 2d 1131, 1137 (9th Cir. 1986); *Shore v. Federal Express Corp.*, 777 F. 2d 1135, 1159 (6th Cir. 1985); *Goss v. Exxon Office Systems Co.*, 747 F. 2d 885, 890 (3d Cir. 1984); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984)(opinion by Kennedy, J.).

There is significant empirical evidence that dismissed employees who return to work pursuant to court ordered reinstatement do not long survive in those jobs. Susan Grebeldinger, "*The Role of Workplace Hostility in Determining Prospective Remedies for Employment Discrimination: A Call for Greater Judicial Discretion in Awarding Front Pay*", 1996 U.Ill.L.Rev. 319, 340-42.

[55] *Farley v. Nationwide Mutual Insurance Co.*, 197 F. 3d 1322, 1338 (11th Cir. 1999); *Gotthardt v. National R.R. Passenger Corp.*, 191 F. 3d 1148, 1152, 1155 (9th Cir. 1999); *Ramos v. Davis & Geck, Inc.*, 167 F. 3d 727, 733 (1st Cir. 1999).

[56] *See Nord v. United States Steel Corp.*, 758 F. 2d 1462, 1473-74 (11th Cir. 1985); *Thompson v. Sawyer*, 678 F. 2d 257, 292 (D.C.Cir. 1982).

as soon as possible.[57] Conversely, although denials of backpay are uncommon once the court finds that a violation caused a loss of income, district courts awarding backpay have for a variety of reasons declined also to award front pay as well, and the appellate courts have generally deferred to such trial court decision where it was exercised in a manner consistent with *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). See Appendix C.

Third, if front pay is to be awarded, the trial court must decide what form that award will take. The court may order that the victim be paid a particular wage (often subject to various deductions) until the occurrence of a given event, such as the offer of or appointment to a given position, the date on which the employee would have retired, or simply the passage of a given number of years.[58] These wages are paid out periodically until the specified cutoff point, and are subject to ongoing modification by the court. Only a judge could frame such a decree; "juries don't draft injunctions." *Pals v. Schepel & GMC Truck, Inc.*, 220 F. 3d 495, 500 (7th Cir. 2000). In the alternative, the court may order payment

---

[57] *E.g.*, *Johnson v. Chapel Hill Independent School Dist.*, 853 F. 2d 375, 382 (5th Cir. 1988); *James v. Stockham Valves & Fittings Co.*, 559 F. 2d 310, 358 (5th Cir. 1977); *EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579, 590-91 (2d Cir. 1976).

[58] *E.g.*, *Shore v. Federal Express Corp.*, 42 F. 3d 373, 377-89 (6th Cir. 1994); *Anderson v. Group Hospitalization, Inc.*, 820 F. 2d 465, 473 (D.C.Cir. 1987); *Polk v. Yellow Freight System, Inc.*, 801 F. 2d 190, 192 n. 2 (6th Cir. 1986); *Horn v. Duke Homes, Div. of Windsor Mobile Homes*, 755 F. 2d 599, 603 (7th Cir. 1985); *Day v. Wayne County Bd. of Auditors*, 749 F. 2d 1199, 1201 (6th Cir. 1984); *Briseno v. Central Technical Community College Area*, 739 F. 2d 344, 348 (8th Cir. 1984). A detailed argument for this form of front pay is set out in *Stafford v. Electronic Data Systems Corp.*, 749 F. Supp. 781, 787-92 (E.D.Mich. 1990).

of a single lump sum, which represents the discounted value of a hypothetical income stream.[59] Lump sum payments require a degree of prediction about future events (how wage rates would have changed, how much the employee would have earned from any other employment, etc.), but do not require ongoing judicial scrutiny of the employer's actions. Courts may also retain jurisdiction over the case, and periodically order additional monetary relief for the period since the last such order; in that instance these subsequent retrospective orders are referred to as backpay.[60]

Fourth, trial judges have properly been accorded a broad degree of discretion in determining the amount of a front pay award.[61]

(2) If in a particular case an award of front pay were precluded by the subsection (b)(3) caps, that would compel the trial judge to reconsider his or her decision to utilize front pay rather than enter an injunction directing immediate reinstatement.

Prior to the 1991 Civil Rights Act, and today in circuits other than the Sixth, a judge's decision about whether

---

[59] *E.g.*, *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F. 2d 945, 956 (10th Cir. 1980); see n. 16, *supra*.

[60] *E.g.*, *Suggs v. Servicemaster Educ. Food Management*, 72 F. 3d 1228, 1235 and n. 4 (6th Cir. 1996); *James v. Stockham Valves & Fittings Co.*, 559 F. 2d 310, 368 (5th Cir. 1977); *Patterson v. American Tobacco Co.*, 535 F. 2d 257, 269 (4th Cir. 1976).

[61] *Proctor v. Consolidated Freightways Corp. of Delaware*, 942 F. 2d 793 (table), 1991 WL 170024 *5 (9th Cir. 1991); *Carter v. Sedgwick County, Kan.*, 929 F. 2d 1501, 1505 (10th Cir. 1991); *Johnson v. Chapel Hill Independent School Dist.*, 853 F. 2d 375, 382-83 (5th Cir. 1988); *Goss v. Exxon Office Systems Co.*, 747 F. 2d 885, 891 (3d Cir. 1984).

to order reinstatement is a choice between two alternatives, since if the judge rejects reinstatement he or she can then turn to the option of front pay. Under the Sixth Circuit rule, however, a judge in a jury trial would have to make a tentative decision about reinstatement without knowing whether front pay might later be precluded because of the statutory cap. If a jury's compensatory and punitive award in turn precluded front pay, the court would properly need to reassess its decision to deny reinstatement; a court might choose in advance of the jury verdict to award reinstatement, rather than opt for the front pay option and run the risk that the caps would preclude such relief.

The actual or potential unavailability of front pay could thus lead judges to order reinstatement, or immediate rather than eventual reinstatement, in circumstances where they sensibly would have chosen to act otherwise prior to the Sixth Circuit rule in *Hudson v. Reno*. In cases where no vacancy existed, such a reinstatement order might require bumping; the result of the cap would thus be to shift from the culpable employer to an innocent incumbent employee the cost of redressing the proven discrimination. If a court were to order reinstatement despite palpable animus towards a plaintiff, that would often lead to a new set of violations, a second round of litigation, and another award of back pay and compensatory and punitive damages--consequences that would ill serve the interests of either the employer or the employee.[62]

In the alternative, a court which wanted to provide monetary relief could apparently avoid the problem created by

---

[62] *See Bruso v. United Airlines, Inc.*, 2001 WL 87635 *11 (7th Cir.)(front pay the preferable remedy where reinstatement would "cause the court to become embroiled in each and every employment dispute that arose between the plaintiff and the employer following the plaintiff's reinstatement.")

the caps simply by retaining jurisdiction and making periodic, retrospective awards of back pay.

(3) The potential application of the subsection (b)(3) caps to front pay would create perverse incentives for defendants. First, in a case where discriminatory officials know that they have already caused damages equal to or greater than the statutory limitation, they could without cost prevent the reemployment of the victim by creating working conditions so intolerable that the victim would not want or be able to return to work. Prior to the adoption of the 1991 Act there was a distinct disincentive for such behavior; even if the victim did not return to work, she or he would at least receive front pay. But the Sixth Circuit rule gives discriminatory officials a new ability to abuse their victim; they could not only drive her from work, but also guarantee that she be financially worse off, if not impoverished, long after an inadequate final judgment left her without either front pay or a job. At current interest rates, the maximum $300,000 damage judgment would generate only about $15,000 a year, often far less than many victims were making or could have obtained in front pay prior to the 1991 Act. In the instant case, for example, petitioner was earning $60,000 annually at DuPont. (Tr. 141). In a case such as this, where the culpable officials acted with a palpable desire to injure petitioner, the Sixth Circuit rule assures the perpetrators that the courts will be powerless to prevent that scheme of abuse from succeeding.[63]

---

[63] *See EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F. 2d 1225, 1232 (10th Cir. 1984)(if front pay were not available, "an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return."

Second, the Sixth Circuit rule provides a powerful incentive for an employer to refrain from taking corrective measures. This Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), construed Title VII to encourage preventative and remedial action. In a wrongful dismissal case such as this prior to the 1991 Act, a defendant employer in the Sixth Circuit would have had good reason to remedy the sort of abusive conditions that existed in this case; absent such corrective measures, a court would likely find reinstatement impracticable and order front pay. But if an employer realizes that front pay will be precluded because of the damage cap, it can with impunity leave those conditions unredressed. Indeed, an employer which wanted to prevent a victim from returning to work could do so with financial impunity simply by permitting the hostile work environment to persist.

Under the Sixth Circuit rule, an employer which engaged in actionable but not egregious harassment, and an employer which took effective corrective action once it learns of abuses, will be subject to a reinstatement order. But under that rule an employer can, without cost, prevent reinstatement by engaging in particularly severe harassment or by refusing to take actions that would end the hostile environment that had driven a victim from her job. An avowed purpose of the 1991 Civil Rights Act was to deter intentional discrimination. 105 Stat. 1071. The Congress which adopted that Act assuredly did not intend to create incentives that would encourage the worst forms of abuse and reward employers which did the least to correct them.

(4) If, as the Sixth Circuit held, front pay is a form of compensatory damages, then front pay awards would have to be made by a jury whenever a party requested a jury trial.

Because of the nature of front pay, such a scheme would raise serious practical problems.

The Sixth Circuit appears to have assumed that where reinstatement is denied, the determination of *whether* to award front pay will be made by the judge, with the jury relegated to deciding the amount of the front pay. *Hudson v. Reno*, 130 F. 3d at 1203-04. But if front pay *is* compensatory damages, surely the decision whether to make such an award will have to be made by the jury in any case in which a jury is requested. The decision whether to award damages is always a jury issue in a jury trial. Unlike front pay, which judges have discretion to deny, compensatory damages must be awarded for an injury caused by an employer's violation of Title VII. Thus classifying front pay as compensatory damages would often make such awards mandatory rather than discretionary, and would shift from judges to juries the responsibility for determining whether such an award should be made.

The possibility of awarding front pay only arises after the court has decided whether or not to order reinstatement, either at once or at all. If a jury were to be responsible for awarding front pay, the court's decision to grant, deny or postpone reinstatement would have to be made between the end of closing arguments and the instruction of the jury. In an ordinary trial those two events occur in immediate succession. But the granting and framing of injunctive relief requires the court to carefully review the evidence, often with the assistance of briefs and a transcript, and the trial judge is at times obligated to provide on the record an explanation of the basis of his or her decision.[64] If the appropriateness of

---

[64] In a number of instances appellate courts have overturned trial judge decisions in favor of front pay or reinstatement because the lower court had not explained its action. *E.g.*, *EEOC v. W &*

reinstatement were in dispute, judges would have to choose between either (a) making in a few minutes or hours decisions about injunctive relief that in the past were made only after considered reflection, or (b) recessing the trial for days or weeks while the matter of reinstatement was resolved.

The decision whether (and if so, how) to order reinstatement itself requires the trial judge to make factual findings about the events which gave rise to the action, and perhaps about the currently prevailing conditions at the worker's old job. These will often be among the very factual issues in contention with regard to the merits of the underlying action. If, for example, a plaintiff alleged she had been sexually abused by her boss and then fired because of her gender, reinstatement might be perfectly appropriate if the second allegation were proven, but not if the first one were sustained. Under the practice prevailing outside the Sixth Circuit, a jury first makes such liability determinations; the court can in turn rely on those findings in determining reinstatement, and then front pay. But if the court must resolve reinstatement issues before a case goes to the jury, then the judge would often have to make his or her own determination of the merits of the action prior to charging the jury, a practice precluded by *Beacon Theaters v. Westover*, 359 U.S. 500 (1959).[65] The only solution to these related procedural problems would be a trifurcated procedure, under which (a) the jury makes a determination of liability, (b) the

---

O, Inc., 213 F. 3d 600, 619 (11th Cir. 2000); *Farley v. Nationwide Mutual Insurance Co.*, 197 F. 3d 1322, 1338 (11th Cir. 1999); *Rutherford v. Harris County, Texas*, 197 F. 3d 173, 187-88 (5th Cir. 1999).

[65] *See Pals v. Schepel & GMC Truck, Inc.*, 220 F. 3d 495, 500 (7th Cir. 2000)(in resolving issues regarding reinstatement or front pay trial judge must defer to factual determinations of jury).

trial judge next makes a considered determination about reinstatement in light of those findings, and if reinstatement is denied or postponed then (c) the jury is reconvened to make a decision about front pay.

Where the decisions have been made both to deny reinstatement and to award front pay, a determination must next be made whether the award should be a lump sum, or should take the form of an order that the employer make periodic payments until a given date (e.g., reinstatement) subject to specified conditions (e.g., so long as the employee is still looking for work) and under continuing supervision by the court. It is difficult to see how a jury would be capable of choosing between these two types of front pay, or how it could frame a periodic payment order. A periodic payment order is essentially an injunction, and would have to be fashioned by a judge. Since such an order assuredly would be equitable, this form of front pay at least would not be compensatory damages and would necessarily fall outside the subsection (b)(3) cap.

Finally, if judges were to decide whether front pay should be awarded, but juries were to fix the amount, there would be a substantial risk that those decisions would be based on conflicting views of the evidence[66]; a judge could not

---

[66] *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F. 2d 1249, 1257 (2d Cir. 1987):

> "There is much overlap between the facts relevant to whether an award of front pay is appropriate and those relevant to the size of the award. For example, both questions turn in part on the ease with which the employee will be able to find other employment. To divide the fact-finding responsibilities in such circumstances would be anomalous and would risk inconsistent decisions. A jury might conclude that the employee would never find other work and award a large sum in

direct the jury to accept his or her assessment of the evidence without violating *Beacon Theaters*. Moreover, although in the case of a lump sum award a decision about the amount of money a plaintiff could have expected to earn but for the proven discrimination may be a manageable fact-specific prediction, the determination about the length of time for which front pay should be awarded is an intensely discretionary choice regarding which trial judges have traditionally been accorded broad latitude. Such equitable discretion is at odds with the traditional role of juries in determining compensatory damages.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

KATHLEEN L. CALDWELL
ALAYNE B. ADAMS
Counsel of Record
Taylor, Halliburton,
Ledbetter & Caldwell
44 North Second Street
Suite 200
Memphis, TN 38103
(901) 523-8153

---

front pay, while the judge found that he or she would find work immediately and that no award was appropriate. Or a judge might find front pay appropriate, but the jury might award only a nominal sum based on its belief that the employee could secure immediate employment."

ERIC SCHNAPPER
University of Washington
School of Law
1100 N.E. Campus Parkway
Seattle, WA 98105
(206) 616-3167

Counsel for Petitioner

APPENDIX A

TITLE VII FRONT PAY CASES DECIDED BY THE COURTS OF APPEALS PRIOR TO THE ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991

Proctor v. Consolidated Freightways Corp. of Delaware, 942 F. 2d 793 (table), 1991 WL 170024 *4-*5 (9th Cir. 1991)(affirming award of front pay)

Carter v. Sedgwick County, Kan., 929 F. 2d 1501, 1505 (10th Cir. 1991) (directing modification of district court's front pay order)

Weaver v. Casa Gallardo, Inc., 922 F. 2d 1515, 1528-29 (11th Cir. 1991) ("prevailing Title VII plaintiffs are presumptively entitled to either reinstatement or front pay")

Barbano v. Madison County, 922 F. 2d 139, 146 (2d Cir. 1990)

Hopkins v. Price Waterhouse, 920 F. 2d 967, 981 (D.C.Cir. 1990)

Simmons v. Marsh, 917 F. 2d 23 (table), 1990 WL 163059 *4 (4th Cir. 1990)("The great weight of authority denies compensatory and punitive damages under Title VII because the statute provides only for equitable relief in the form of back pay, front pay, remedial seniority, injunctions and declaratory relief")

Sellers v. Delgado Community College, 902 F. 2d 1189, 1196 (5th Cir. 1990)

Edwards v. Occidental Chemical Corp., 892 F. 2d 1442, 1448-49 (9th Cir. 1990)

Lander v. Lujan, 888 F. 2d 153, 159 (D.C.Cir. 1989)(Ginsburg, J., concurring)("the 'rightful place' approach, when it is coupled with a 'front pay' award, is sometimes the more appropriate remedy")

Brooms v. Regal Tube Co., 881 F. 2d 412, 424 n. 9 (7th Cir. 1989)

EEOC v. General Lines, Inc., 865 F. 2d 1555, 1564 (10th Cir. 1989)

Erebia v. Chrysler Plastic Products Corp., 863 F. 2d 47 (table), 1988 WL 125356 *1-*3 (6th Cir. 1988)("[t]he normal practice is to award front pay in those situations where reinstatement is not appropriate"), *see* Erebia v. Chrysler Plastic Products Corp., 891 F. 2d 1212, 1213-14 (6th Cir. 1989)

Johnson v. Chapel Hill Independent School Dist., 853 F. 2d 375, 381-82 (5th Cir. 1988)("In appropriate circumstances . . . front pay may be awarded")

King v. Staley, 849 F. 2d 1143, 1144-45 (8th Cir. 1988)(reversing district court denial of front pay)

Floca v. Homcare Health Services, Inc., 845 F. 2d 108,112 (5th Cir. 1988)("Front pay is awarded to meet the goal of Title VII to make whole the victims of discrimination")

Green v. USX Corp., 843 F. 2d 1511, 1531 (3d Cir. 1988)("The decision to award front pay as relief in Title VII cases rests certainly within the discretion of the trial court")

Pitre v. Western Elec. Co., Inc., 843 F. 2d 1262, 1278 (10th Cir. 1988)("Front pay is a substitute for immediate promotion which cannot occur because there are no positions currently available")

Spears v. Board of Educ. of Pike County, Ky., 843 F. 2d 882, 885-86 (6th Cir. 1988)(remanding to district court for recalculation of front pay)

Anderson v. Group Hospitalization, Inc., 820 F. 2d 465, 473 (D.C.Cir. 1987)(affirming award of front pay)

Sellers v. Delgado Community College, 839 F. 2d 1132, 1141 (5th Cir. 1988)

Thorne v. City of El Segundo, 802 F. 2d 1131, 1137 (9th Cir. 1986)("Awards of front pay are appropriate when it is impossible to reinstate the plaintiff")

Pecker v. Heckler, 801 F. 2d 709, 713 and n. 8 (4th Cir. 1986)("Our prior cases have embraced the concept of awarding front pay as part of a make whole remedy for employment discrimination")

Sellers v. Delgado Community College, 781 F. 2d 503, 505 (5th Cir. 1986)(authorizing district court to award front pay on remand)

Shore v. Federal Express Corp., 777 F. 2d 1155, 1159-60 (6th Cir. 1985)(front pay to be awarded in Title VII cases

where it "will aid in ending illegal discrimination and rectifying the harm it causes")

Nord v. United States Steel Corp., 758 F. 2d 1462, 1473 (11th Cir. 1985)("As an alternative to reinstatement, the court could have ordered front pay")

Horn v. Duke Homes, Div. of Windsor Mobile Homes, 755 F. 2d 599, 603 (7th Cir. 1985)

Day v. Wayne County Bd. of Auditors, 749 F. 2d 1199, 1201 (6th Cir. 1984)

Goss v. Exxon Office Systems Co., 747 F. 2d 885, 890 (3d Cir. 1984)("The award of future lost earnings in Title VII cases is an alternative to the traditional equitable remedy of reinstatement.")

Dillon v. Coles, 746 F. 2d 998, 1006 (3d Cir. 1984)

Fadhl v. City and County of San Francisco, 741 F. 2d 1163, 1167 (9th Cir. 1984)

Briseno v. Central Technical Community College Area, 739 F. 2d 344, 348 (8th Cir. 1984)(broadening front pay order of district court)

Ingram v. Madison Square Garden Center, Inc., 709 F. 2d 807, 813 (2d Cir. 1983)

Carpenter v. Stephen F. Austin State U., 706 F. 2d 608, 632 n. 14 (5th Cir. 1983)("Front pay is a recognized form of Title VII compensation")

Thompson v. Sawyer, 678 F. 2d 257, 292-93 (D.C.Cir. 1982)("Awards of front pay are to be judged by the standards applied to all Title VII relief: whether they will further the goals of ending illegal discrimination and rectifying the harm it causes")

Association Against Discrimination v. City of Bridgeport, 647 F.2d 256, 269 n. 9 (2d Cir. 1981)(affirming award of front pay)

EEOC v. Safeway Stores, Inc., 634 F. 2d 1273, 1381-82 (10th Cir. 1980)(front pay approved by *Franks v. Bowman Transportation, Inc.*)

Falcon v. General Tel. Co. of Southwest, 626 F. 2d 369, 383-84 and n. 22 (5th Cir. 1980)

United States v. Lee Way Motor Freight, Inc., 625 F. 2d 918, 932 (10th Cir. 1979)

Fitzgerald v. Sirloin Stockade, Inc., 624 F. 2d 945, 956 (10th Cir. 1980)(affirming award of front pay)

Kamberos v. GTE Automatic Elec., Inc., 603 F. 2d 598, 603 (4th Cir. 1979)

Hill v. Western Elec. Co., 596 F. 2d 99, 104 (4th Cir. 1979)(affirming award of front pay)

White v. Carolina Paperboard Corp., 564 F. 2d 1073, 1091 (4th cir. 1977)(backpay may be supplemented "by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position," *quoting Patterson v. American Tobacco*)

James v. Stockham Valves & Fittings Co., 559 F. 2d 310, 357-58 (5th Cir. 1977)("We agree that there are cases in which [front pay] is appropriate")

EEOC v. Enterprise Ass'n Steamfitters, 542 F. 2d 579, 590-91 (2d Cir. 1976)("backpay" to continue until victims appointed to jobs they would have held but for discrimination)

Patterson v. American Tobacco Co., 535 F. 2d 257, 267-70 (4th Cir. 1976)("backpay" must continue after judgment until discrimination victims reach jobs they would have held but for proven discrimination)

APPENDIX B

DECISIONS FAVORING FRONT PAY TO AVOID "BUMPING" AN INNOCENT INCUMBENT EMPLOYEE

Doll v. Brown, 75 F. 3d 1200, 1207 (7th Cir. 1996)

Walsdorf v. Board of Commissioners for the East Jefferson Levee District, 857 F. 2d 1047, 1053 (5th Cir. 1988)

King v. Staley, 849 F. 2d 1143, 1145 (8th Cir. 1988)

Patterson v. American Tobacco Co., 535 F. 2d 257, 266-69 (4th Cir. 1976)

Gobert v. Babbitt, 2000 WL 1876254 *2 (E.D.La.)

Moore v. University of Notre Dame, 22 F. Supp. 2d 896, 904 (N.D.Ind. 1998)

Roy v. The Austin Co., 1998 WL 544411 *5 (N.D.Ill.)

Paul v. CMC Manufacturing, Inc., 1998 WL 527102 *1 (N.D.Miss.)

Colwell v. Suffolk County Police Dept., 967 F. Supp. 1419, 1433 (E.D.N.Y. 1997)

Kraemer v. Franklin and Marshall College, 941 F. Supp. 479, 482 (E.D.Pa. 1996)

Mitchell v. Sisters of Charity of the Incarnate Word, 924 F. Supp. 793, 803-04 (S.D.Tex. 1996)

Reed v. A.W. Lawrence, 889 F. Supp. 594, 598 (N.D.N.Y. 1995)

Reilly v. Cisneros, 835 F. Supp. 96, 99 (W.D.N.Y. 1993)

Hicks v. Dothan City Bd. of Ed., 814 F. Supp. 1044, 1050 (M.D.Ala. 1993)

McCann v. Litton Systems, Inc., 767 F. Supp. 127, 130 (S.D.Miss 1991)

Essa v. Hartford Fire Insurance Co., 1991 WL 255111 *11 (N.D.N.Y.)

Willis v. Watson Chapel School District, 749 F. Supp. 923, 923 (E.D.Ark. 1990)

Valdez v. Church's Fried Chicken, 683 F. Supp. 596, 636 (W.D.Tex. 1988)

Boyd v. SCM Allied Paper Co., 1986 WL 15558 *13 (N.D.Ill.)

Jackson v. Alterman Foods, Inc., 1985 WL 6430 *1 (N.D.Ga.)

Ivey v. Western Electric Co., 1978 WL 42 *7 (N.D.Ga. 1978)

White v. Carolina Paperboard, 1975 WL 250 *8 (W.D.N.C.)

APPENDIX C

DECISIONS HOLDING DISTRICT COURT DENIAL OF FRONT PAY NOT AN ABUSE OF DISCRETION

Bruso v. United Airlines, Inc., 2001 WL 87635 *13 (7th Cir.)(plaintiff failed to offer sufficient evidence of how long he would have remained with the employer)

Excel Corp. v. Bosley, 165 F. 3d 635, 639-40 (8th Cir. 1999)(plaintiff had failed to mitigate damages)

Sellers v. Delgado Community College, 902 F. 2d 1189, 1196 (8th Cir. 1990)(plaintiff had persistently failed to mitigate damages by seeking other employment)

Brooms v. Regal Tube Co., 881 F. 2d 412, 424 n. 9 (7th Cir. 1989)(plaintiff failed to offer evidence regarding front pay)

Erebia v. Chrysler Plastic Products Corp., 863 F. 2d 47 (table), 1988 WL 125356 *2-*3 (6th Cir. 1988)(plaintiff had sexually harassed several subordinates)

Floca v. Homcare Health Services, Inc., 845 F. 2d 108, 112 (5th Cir. 1988)(plaintiff had left nursing profession to enter law school)

Dillon v. Coles, 746 F. 2d 998, 1006 (3d Cir. 1984)(unlikely rejected applicant would have remained an employee very long)